IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Petitioners,

—against—

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit is reported at 565 F. 2d 815 (1977) and is set forth at Appendix A, pages 1a-19a, annexed to the petition for certiorari.*

Jurisdiction of This Court

The jurisdiction of this Court is adequately set forth in the Brief for Petitioners at page 2.

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* Citation herein to pages of each of the five appendices annexed to the petition for certiorari will appear as follows: "App. ——, p. ——."

Constitutional Provision and Federal Rule Involved

Rule 1 of the Federal Rules of Civil Procedure provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

The pertinent provision of the United States Constitution is set forth in the Brief for Petitioners at page 2.

Questions Presented

1. Was the decision of the Court below correct in precluding re-litigation by the Petitioners to a jury of issues already fully and fairly litigated to a court and there determined against them, while preserving for the Petitioners their Seventh Amendment jury trial right on all other issues, including the amount of damages, in this action?

2. Can refinements in the doctrine of collateral estoppel be introduced into the common law in a manner consistent with the first mandate of the Seventh Amendment, which relates to the preservation of the right to jury trial, while cases such as *Dimick* v. *Scheidt*, 293 U.S. 474 (1935) read the second mandate of the Amendment, which prohibits re-determination by a court of issues previously determined by a jury, more restrictively?

3. Is the decision below consistent with the decisions in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) and its progeny?

4. Was the observation by the Court below, that the Petitioners had lost their jury trial right in this action by failing to protect that right in a prior Securities and Exchange Commission enforcement action, mere dictum and not necessary for the decision below?

Statement of the Case

This action was commenced in the United States District Court for the Southern District of New York on November 13, 1974, against Petitioners and twelve other defendants who were officers, directors and/or shareholders of Petitioner Parklane Hosiery Company, Inc. ("Parklane") as of the date of the merger described below. The action was certified, by Order dated May 2, 1975, as a class action on behalf of all Parklane shareholders on September 14, 1974, the record date in connection with said merger. The Complaint, as amended (hereinafter the "Complaint"), alleged violations of Sections 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules promulgated thereunder and the common law.

The action is based upon a false and misleading proxy statement dated September 24, 1974 (the "Proxy Statement") which the Complaint alleges fraudulently caused a merger (the "Merger") in which the public shareholders of Parklane were bought out of Parklane. As a result of the Merger, Parklane was merged with New PLHC Corp., a company incorporated solely to act as a corporation to merge with Parklane. Prior to the Merger, the individual defendants owned 71.6% of the issued and outstanding shares of Parklane. They transferred these shares to New PLHC Corp. immediately prior to the Merger and, at such time, their shares became its only asset. In full payment

for their Parklane shares, the public shareholders were paid, in the Merger, $2.00 per share cash, whereas the individual defendants received shares of New PLHC Corp. and the right to participate in its future business.

Respondent alleged in the Complaint that the Proxy Statement was false and misleading in that, *inter alia:*

(a) it made statements as to various reasons why Parklane would be converted to a privately-owned company when, in fact, the true undisclosed reason for its conversion was to aid Petitioner Herbert N. Somekh ("Somekh") in meeting his personal financial obligations;

(b) it made statements concerning the termination of negotiations with the Federal Reserve Board of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB when, in fact, the defendants failed to disclose the existence of on-going negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits; and

(c) it made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact the defendants failed to disclose in the Proxy Statement that the two appraisers were not provided with sufficient information to prepare and provide a true and complete valuation of such stock.

Respondent further alleged that the distribution of the Proxy Statement was part of a fraudulent scheme giving rise to liability to the Respondent and other members of the class under Section 10(b) and the common law.

In May, 1976, the Securities and Exchange Commission ("SEC") commenced an action in the Southern District of New York against Petitioners alleging that the Proxy Statement was false and misleading (the "SEC action"). After trial therein, the District Court, finding intentional violations by Petitioners of the 1934 Act, held:

(a) "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the Proxy Statement. The non-disclosure [in the Proxy Statement] is clearly established." *Securities and Exchange Commission* v. *Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, 482 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

(b) "I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term 'negotiation' [footnote omitted]. Thus, the unamended proxy material was false when it stated that 'there are no negotiations at present'." *Id.*, 422 F. Supp. at 483.

(c) "The failure to inform Thomson & McKinnon [one of the appraisers] of these facts and the failure to disclose the defect in the appraisal in the Proxy Statement is beyond question." *Id.*, 422 F. Supp. at 484.

The District Court further held that these misstatements in, and omissions from, the Proxy Statement were material and intentional. *Id.*, 422 F. Supp. at 486-487.

On July 8, 1977, the Court of Appeals for the Second Circuit specifically affirmed each of these findings of the District Court in the SEC action. 558 F.2d at 1086-1087.

In the SEC action, Petitioners had a full and fair opportunity to, and did, litigate the accuracy of the Proxy Statement. Nowhere in their papers before this Court, the Court below or the District Court did Petitioners even hint that they did not receive a full and fair adjudication in the SEC action. After that adjudication, both the District Court and Court of Appeals found the Proxy Statement to be materially and intentionally misleading for the reasons alleged in the Complaint.

After the District Court decision in the SEC action, Respondent moved for partial summary judgment on liability based on the factual findings in the SEC action. The District Court denied Respondent's motion. App. E., p. 26(a). Respondent then moved, pursuant to 28 U.S.C. §1292(b) and Rule 5, Fed. R. App. P., for certification of a question for appeal. The District Court granted the motion and the Court below granted the petition for leave to appeal.

The Court below, relying on numerous decisions of this Court including, in particular, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), and *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), unanimously reversed the District Court's decision. In so deciding, the Court below found no constitutional requirement that " . . . a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the same issues of fact arising out of the same transaction." App. A., pp. 2a-3a.

On December 20, 1977, (a) the Court below denied Petitioners' motion for rehearing and (b) the Court of Appeals for the Second Circuit denied Petitioners' suggestion that the action be reheard *in banc*.

This Court allowed certiorari by order filed on May 1, 1978 (page 62a of Appendix filed with Brief for Petitioners).

Summary of Argument

The decision below is consistent with almost 140 years of decisions by this Court which, as a result of the refinement and creation of procedural devices, have precluded from jury determination factual issues which could have been decided by juries at the time of the adoption of the Seventh Amendment in 1791. A procedural refinement consistent with that historical development was effected by this Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). In that case, this Court, by removing mutuality of estoppel as a prerequisite to the application of the doctrine of collateral estoppel, decided that a party which has had certain issues of fact determined against it, after a full and fair opportunity to litigate them, may not, in a different suit against it, re-litigate those same issues of fact. Based on the decision in *Blonder-Tongue*, Petitioners here are precluded from re-litigating in this action the factual issues determined in the SEC action. By its decision, the Court below did not deny Petitioners their Seventh Amendment jury trial right since they retain the right to a trial on all issues, including damages, not decided in the SEC action.

I. Numerous decisions of this Court, rendered as early as 1850, make clear that new procedural devices may be utilized by a judge to determine whether there are issues of fact to be decided by a jury. Precluding jury determination of the factual issues determined in the SEC action is consistent with the long-established principle, reiterated often by this Court, that new procedural methods

may be used to determine if facts are actually in issue. *Ex parte Peterson*, 253 U.S. 300 (1919).

The decision in *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), is not relevant to the instant action since it deals with that part of the Seventh Amendment relating to the prohibition of a court's re-examination of issues decided by a jury. The instant action deals with that portion of the Amendment relating to the preservation of the jury trial right. Greater flexibility has been permitted the courts in cases involving the portion of the Seventh Amendment here in issue. See, *e.g.*, *Ex parte Peterson, supra; Galloway* v. *United States*, 319 U.S. 392, *rehearing denied*, 320 U.S. 214 (1943).

II. Based upon considerations of fairness and equity, the doctrine of collateral estoppel should be applied in the instant case. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois, supra*, 402 U.S. at 333-334. Defendants were aware of this action when the SEC action was begun since this action had been commenced prior to the SEC action. *The Evergreens* v. *Nunan*, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

III. The decision below properly analyzed *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) and its progeny, while the court in *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), erred in its analysis of that line of cases. *Beacon Theatres* stands for the proposition that where a party joins legal and equitable claims arising out of the same transaction, the court must order the legal claim tried first by a jury so as to protect the jury trial right. In this action, scheduling is not in issue since the trial of the equitable claim was completed before this action could be tried. Therefore, based on the decision in *Beacon Theatres*, the court below correctly held that the determination of the issues on which

the equitable claim in the SEC action was based precludes the re-litigation of those issues in the instant action.

IV. The observation by the Court below, that Petitioners failed to protect their right to a jury trial in this action by their failure to either request a trial before a jury or an advisory jury in the SEC action or stay the trial of the SEC action pending trial of this action, was mere *dictum*. It was completely unnecessary to the decision below.

ARGUMENT

I.

The Court below did not deprive Petitioners of any jury trial right, but merely precluded re-litigation of the issues decided in the SEC action, leaving for jury determination all other issues.

The Seventh Amendment states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Under the Seventh Amendment the purpose of the jury was, and is, to hear and decide facts in certain civil cases. The limits of the Seventh Amendment were interpreted by this Court in *Ex parte Peterson*, 253 U.S. 300, 310 (1919) where it wrote:

> "No one is entitled in a civil case to trial by jury unless and except so far as there are facts to be determined."

For well over a hundred years, this Court has explored, accepted and advanced numerous procedures directed towards the initial determination of whether facts exist upon which a jury can make a decision and this Court has long held that such initial determination does not offend the dictates of the Seventh Amendment. In fact, such consideration is an integral part of the Seventh Amendment. As this Court stated in *Ex parte Peterson, supra,* at 309:

> "It [the Seventh Amendment] does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adopt the ancient institution to present needs to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right."

A new method for determining whether facts are actually in issue was approved by this Court in *Blonder-Tongue, supra.* In that decision, mutuality of parties was recognized as no longer being a prerequisite to the application of collateral estoppel (See pp. 21, *et seq., infra.*) By relying on that decision and precluding re-litigation by Petitioners of previously determined issues, the Court below reached its decision based on the road map for Seventh Amendment analysis provided by this Court.

A. The Seventh Amendment permits refinements in the role of judges in determining whether facts exist to be heard by a jury.

As early as *Parks* v. *Ross,* 11 How. 362, 372-373 (1850), this Court was extending the power of judges to determine whether facts were in issue for a jury to hear and decide.

This Court there, in approving the use of the directed verdict, stated:

> "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.
>
> "Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

This decision was an extension of the judge's role in determining whether facts existed to be heard by a jury. See *Greenleaf* v. *Birth,* 9 Pet. 292 (1835).* This extension of the role of the Court has been re-affirmed often and in many different ways since 1850. For example, this Court held that a federal court, without the consent of the parties, may appoint auditors to hear testimony, examine books and accounts and frame and report upon issues of fact, as an aid to the jury in arriving at its verdict, *Ex*

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* Justice Black recognized in his dissent in *Galloway* v. *United States,* 319 U.S. 372, 402, *rehearing denied,* 320 U.S. 214 (1943) that the decision in *Parks* v. *Ross* was "an innovation, a departure from the traditional rule restated only fifteen years before" in *Greenleaf* v. *Birth, supra.* He found the directed verdict approved in *Parks* v. *Ross, supra,* to be a significant departure from the demurrer to the evidence and that it therefore contained new potentialities for judicial control of the jury.

parte Peterson, supra. A court may require both a general and a special verdict and set aside the general verdict for the defendant on the basis of the facts specially found. *Walker* v. *New Mexico & Southern Pacific R. Co.*, 165 U.S. 593 (1897). A court may accept so much of the verdict as declares that the plaintiff is entitled to recover, and set aside so much of it as fixes the amount of the damages, and order a new trial of that issue alone. *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). None of these procedures was known to the common law; all have been approved by this Court.

In *Galloway* v. *United States*, 319 U.S. 372, 389-392 (1943), this Court re-affirmed the constitutionality of the directed verdict. There, this Court explicitly stated that, since 1791, the interpretation of the Seventh Amendment has permitted changes in the procedure by which the judge determines whether there are factual issues to be decided by the jury.

> "It is not that 'the rules of the common law' in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791.
>
> • • •
>
> "Nor were 'the rules of the common law' then prevalent [in 1791], including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. *On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries.* In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them

> and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form." (Emphasis added). (Footnotes omitted).

The reasoning of this Court in *Galloway* is based on a sound historical analysis of the Seventh Amendment. The lack of uniformity of the relationship between judge and jury in the several states and the bearing which that divergence has on the interpretation of the Seventh Amendment is described in Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) (hereinafter cited as "Henderson") which states:

> "Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific 'legislative history' of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all. Nor can any implicit understanding as to this relationship be presumed, for among the thirteen original states there were at least half a dozen widely differing patterns of civil practice, as an examination of the available case law will show. On the contrary, it was well understood that no single system of civil practice could satisfy everybody. The varied procedures of the federal courts in the early years provide further evidence that no particular pattern was understood to be prescribed." 80 Harv. L. Rev. at 290.

Since the relationship between the judge and jury is not codified in the Seventh Amendment, this Court has permitted review of, and refinements to, that relationship. As

the author suggests at the conclusion of the Henderson article, instead of freezing judicial control of the jury to some 1791 standard or standards, the course which this Court has followed has, on the whole, preserved

> ". . . the substance of the common law trial by jury and particularly the jury's power to decide serious questions of fact, while allowing rational modifications of procedure in the interests of efficiency. *The whole thrust of the history of jury practice, both before and after 1790, has been toward rationality of decision and economy of motion in the courtroom.* It is possible to argue for or against the merits of any particular procedural change. But considering the diversity of practice that lies behind the seventh amendment, it seems both unnecessary and undesirable to read that amendment as imposing any but the most general limitations on the Court's power to make such procedural changes." 80 Harv. L. Rev. at 336-337. (Emphasis added). (Footnotes omitted).

In short, the history of the Seventh Amendment demonstrates that procedural changes and refinements in the relationship of judge to jury are not only not repugnant to the Amendment, but quite the contrary, they are required in order to make the jury an efficient instrument of justice. The decision of the Court below, granting collateral estoppel effect to the findings in the SEC action, based upon the decision of this Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), is simply another refinement, approved by this Court, to the relationship of judge to jury. Preclusion of re-determination of the facts found in the SEC action in no way deprives defendants of any Seventh Amendment rights; it is merely a specific method by which the Court below found that certain facts do not exist for jury determination.

This Court stated in *Colgrove* v. *Battin,* 413 U.S. 149, 157 (1973):

> "the purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable resolution of factual issues."

This Court has also stated, in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* 430 U.S. 442 (1977) that "factfinding . . . is the essential function of the jury in civil cases". Where there are no factual issues to be determined, as is the case here with respect to those issues determined in the SEC action, there is no right to a jury trial since to have a jury trial on those issues would be without purpose. As to the determination of all other factual issues, however, the decision below assures the Petitioners of the right to their determination by a jury.

B. *Dimick* v. *Scheidt*, 293 U.S. 474 (1935), related to a portion of the Seventh Amendment not here in issue and the Petitioners' reliance thereon is misplaced.

Dimick v. *Scheidt, supra,* relied upon by the Petitioners, is not a contrary precedent that must be considered in determining this case. The Seventh Amendment contains two specific mandates. First, that in civil actions ". . . the right of trial by jury shall be preserved . . ." and, second, that in civil actions "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The specific question confronting the *Dimick* Court was whether, after a determination of damages by a jury, a trial judge could deny a plaintiff a new trial if the defendant agreed to pay damages in excess of those awarded by the jury. Thus, this Court in *Dimick* was interpreting the

second mandate of the Seventh Amendment. Accordingly, the decision in *Dimick* is inapplicable to this case which rests upon an interpretation of the first mandate of the Amendment. That *Dimick* only related to the clause controlling re-examination of facts determined by a jury is made clear by the language of that decision. After quoting the Seventh Amendment, this Court wrote:

> "Section 269 of the Judicial Code, as amended, U.S.C. Title 28, §391, confers upon all federal courts power to grant new trials 'in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. . .'
>
> "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Thompson* v. *Utah*, 170 U.S. 343, 350; *Patton* v. *United States*, 281 U.S. 276, 288. A careful examination of the English reports prior to that time fails to disclose any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law, with certain exceptions." 293 U.S. at 476-477.

This Court long ago recognized that the Seventh Amendment contains two different mandates which require separate interpretations. In *Parsons* v. *Bedford*, 3 Pet. 433, 447-488 (1830), Justice Story, in analyzing the Seventh Amendment, wrote that it consisted of two clauses. After analyzing the preservation clause, he wrote of the second:

> "*But the other clause of the amendment is still more important; and we read it as a substantial and independent clause.* 'No fact tried by a jury shall be otherwise re-examinable [*sic*], in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." (Emphasis added)

A close examination of the two rights being protected demonstrates that a more restrictive standard should be applied in interpreting the second mandate of the Seventh Amendment. In protecting the right to trial by jury, the first right set forth in the Amendment, this Court has expressly stated that "new methods may be introduced for determining what facts are actually in issue" so as to adapt the "ancient institution [the jury] to present needs to make of it an efficient instrument in the administration of justice" *Ex parte Peterson, supra,* 253 U.S. at 309. The second right protected is the right to have a jury's factual determination stand. No improvement on the jury as an "efficient instrument in the administration of justice" can be made by granting judges the right to re-examine facts tried by jury. The jury trial has been completed, the time has been spent and the "ancient institution" has performed its functions.

It was in protecting the second right in the Seventh Amendment that this Court, in *Dimick,* analyzed the Amendment restrictively. Accordingly, the decision and its rationale are inapplicable to the instant action.

Even assuming, *arguendo,* that *Dimick* is here applicable, it should not disturb the ruling of the Court below since it is inconsistent with the long line of cases cited by plaintiff above and has been closely limited to its particular facts. *See,* Henderson, 80 Harv. L. Rev. at 336. *Dimick's* 5-4 majority decision was strongly criticized in a dissent by Justice Stone, in which he was joined by Justices Bran-

deis and Cardozo and Chief Justice Hughes. However, to the extent that it is good law, it merely stands for the proposition that certain devices are acceptable to this Court to regulate judicial control over the jury and others are not. The specific device proposed in *Dimick* was found unacceptable. That does not mean that all refinements are unacceptable. The decision in *Galloway* v. *United States, supra,* decided only eight years after *Dimick* v. *Scheidt,* proves that *Dimick* is not the absolute bar to procedural innovation and refinements as claimed by the Petitioners here.

C. Petitioners' reliance on cases requiring juries to determine factual issues in cases based on post-1791 statutes is misplaced since the issue here is whether issues already determined by a judge must be heard for a second time by a jury.

Petitioners' argument that a jury trial right exists under the Seventh Amendment with regard to claims for damages brought under post-1791 statutes is misdirected and their reliance on this Court's decision in *Curtis* v. *Loether,* 415 U.S. 189 (1974), is misplaced. Plaintiff does not contend that an ordinary, garden-variety action at law brought under a post-1791 statute would not require a jury trial. Yet that is the proposition for which *Curtis* v. *Loether* stands and is, therefore, irrelevant to the issue here presented. That case was merely

> ". . . an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right . . .". 415 U.S. at 195.

Similarly, Petitioners' reliance on *Pernell* v. *Southall Realty,* 416 U.S. 363 (1974), is misplaced as the issue there, as in *Curtis,* related to the analogy of a post-1791-created right to a pre-1791 form of action. *Curtis, Pernell* and the

related cases cited by Petitioners are directed at the wrong issue.* The question here presented is not whether the cause of action would have been one at law in 1791. The question instead is—given that it is a legal claim in issue, based on a post-1791 statute, are certain issues to be precluded from jury determination. On the issues not yet decided, including damages, the petitioners will, according to the decision below and consistent with *Curtis, supra,* and *Pernell, supra,* be entitled to a jury trial.

II.

Collateral estoppel is a method fashioned by the courts to permit judges to decide that certain facts are not in issue and its application here precludes the relitigation by the Petitioners of facts determined in the SEC action.

Collateral estoppel permits the preclusion of relitigation of certain factual issues which were actually litigated in a prior suit and upon which final judgment was entered. When a court approves the application of the doctrine, the party against whom the doctrine is invoked will not be permitted to re-try the issues which he has had a full and fair opportunity to try in an earlier suit. See, *e.g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971); *Crane Co.* v. *American*

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* *Ross* v. *Bernhard,* 396 U.S. 531 (1970), is unnecessary to the decision below insofar as it stands for the proposition that the historical inquiry has been weakened in determining whether claims are legal or equitable in nature. First, as previously noted, the nature of the claim is not here in issue. In addition, the "abstruse historical inquiry" to which this Court was there referring (396 U.S. at 538, n. 10) related to the custom before the merger of law and equity arising from the adoption of the Federal Rules of Civil Procedure in 1938, not an inquiry as to pre-1791 custom.

Standard, Inc., 490 F.2d 332 (2d Cir. 1973); *Humphreys* v. *Tann*, 487 F.2d 666 (6th Cir. 1973) *cert. denied*, 416 U.S. 956 (1974); *Ritchie* v. *Landau*, 475 F.2d 151 (2d Cir. 1973); *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); 1 B *Moore's Federal Practice*, ¶ 0.441 [2] (2d ed. 1974).

A. Mutuality of parties is no longer a pre-requisite to the application of the doctrine of collateral estoppel.

For a long time, courts had required that there be mutuality between the parties before the doctrine was applied. While the majority of courts were requiring mutuality, however, the doctrine was being eroded from within and without the judiciary. In *Zdanok* v. *Glidden Co., supra*, 327 F.2d at 954-955, the court stated the history and the reasoning for the elimination of mutuality as follows:

> "This doctrine of the need for mutuality of estoppels, criticized by Bentham over a century ago as destitute of any semblance of reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench,' ibid. fn. 14, has been much eroded in recent years. Perhaps the leading federal decision is Judge Hastie's in Bruszewski v. United States, 181 F.2d 419 (3 Cir.), cert. denied, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950), which this court followed in Adriaanse v. United States, 184 F.2d 968 (2 Cir. 1950), cert. denied, 340 U.S. 932, 71 S.Ct. 495, 95 L.Ed. 673 (1951). We see no purpose in multiplying citations since it is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in Bernhard v. Bank of America, 19 Cal.2d 807, 811, 813, 122 P.2d 892, 894-895 (Calif. 1942). Having explained why 'The criteria for determining who may assert a plea of res judicata

> differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted,' and that there is 'no compelling reason • • • for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation,' he said:
>
> 'In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?'" (Footnote omitted).

This Court in *Blonder-Tongue, supra*, invoked the doctrine of collateral estoppel in a patent infringement action where the plaintiff sought to prove the validity of a patent which had earlier been proven invalid, against a defendant who was not a party to the first suit. A unanimous court, approved the use of collateral estoppel even though one of the parties to the second suit had not been a party to the prior action. The Court established that the fundamental issue is not whether there is mutuality of parties, but ". . . whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328.

Numerous decisions subsequent to *Blonder-Tongue* relating to various other issues, have upheld the right of a plaintiff who was not a party to the first action to apply the doctrine of collateral estoppel and preclude the relitigation of issues fully and fairly adjudicated against the defendants in a prior action. *Humphreys* v. *Tann, supra* (airplane crash): *Garcy Corp.* v. *Home Insurance Co.*,

496 F.2d 479 (7th Cir. 1974) (insurance); *Skrzat* v. *Ford Motor Co.*, 389 F. Supp. 753 (D.R.I. 1975) (personal injury); *Michini* v. *Rizzo*, 379 F. Supp. 837 (E.D. Pa. 1974) (civil rights); 1 B *Moore's Federal Practice*, ¶ 0.441 [2] (2d ed. 1974) and cases cited therein.

For example, the court in *Humphreys* v. *Tann, supra,* an action for damages resulting from an airplane collision, blessed the offensive use of collateral estoppel.

> "While the doctrine of collateral estoppel permits a prior judgment to preclude relitigation of an issue previously determined on its merits, it may be applied *in favor of* a stranger to the first action, but only *against* a party to that action." 487 F.2d at 671. (Emphasis in original).

Once, therefore, an issue has been fully and fairly litigated, a litigant may estop a party to re-litigate the same issue in a subsquent suit. It is, however, necessary for the party against whom the plea of estoppel is asserted to have been either a party to, as the Petitioners herein, or in privity with, a party in the prior case. *Blonder-Tongue,* 402 U.S. at 323-324.

The facts in the instant action, that the Proxy Statement was false and misleading in failing to state that the true purpose of the Merger was to bail out Somekh from certain personal obligations, in failing to describe the status of Parklane's negotiations with the FRB and in failing to disclose the status of those negotiations to Parklane's appraisers, were specifically found in the SEC action. Parklane and Somekh were parties to the earlier action and have already fully litigated these issues. Accordingly, they should not be permitted to do so again.

The reasons for precluding re-litigation of the issues determined in the SEC action are clear. Referring to

Rule 1, F. R. Civ. P., the Court below stated that to grant Petitioners a trial on the issues determined in the SEC action:

> ". . . would violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the 'just, speedy and inexpensive determination of every action,' Rule 1, F. R. Civ. P.". App. A, pp. 13a-14a (Footnotes omitted).

B. No unfairness can be shown by the Petitioners herein to prevent the application of collateral estoppel.

Certain commentators and courts have questioned the offensive use of collateral estoppel where it would result in unfairness against the person who is being estopped, such as where numerous individual actions are brought as a result of a mass tort. *See, Zdanok* v. *Glidden Company, supra,* 327 F.2d at 955-956, citing Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 Stan. L. Rev. 281 (1957). *Contra, United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709 (Nev. 1962), *aff'd in part, modified in part on other grounds sub nom. United Air Lines, Inc.* v. *Wiener,* 335 F.2d 379 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).

Here, however, it is entirely fair to permit the plaintiff to benefit from the prior litigation. The Petitioners are not likely to face additional actions since this is a certified class action and, as in all actions so certified, only those who seek exclusion from the class have the right to litigate separately the transaction here in issue, Fed. R. Civ. P. Rule 23.

Moreover, as in *Zdanok* v. *Glidden Co., supra,* the opportunity to litigate the prior action herein was both full and fair. It is unquestionable that in the SEC action, not only did the Petitioners have a full opportunity to, but they did,

litigate the accuracy of the Proxy Statement. Nowhere in any of Petitioners' papers to this Court, the Court below, or the district court, did the Petitioners even hint that they did not receive a full and fair adjudication in the SEC action. Accordingly, they should be estopped to litigate the same issues again.

Another criterion for determining the fairness of applying collateral estoppel was suggested in *The Evergreens* v. *Nunan,* 141 F.2d 927 (2d Cir.), *cert. denied,* 323 U.S. 720 (1944). That standard was the foreseeability of subsequent actions at the time of the commencement of the first suit. In the instant action, unlike *Rachal* v. *Hill,* 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971), heavily relied upon by the Petitioners, Respondent began his suit, based on the same subject matter as the SEC action, over a year before the SEC injunction proceeding began. Respondents did not have to foresee this action when the SEC action began; this action was already being prosecuted. In addition, this action was certified as a class action prior to the institution of the SEC action. Clearly, there would be no unfairness in applying the collateral estoppel doctrine here.

Numerous other policy considerations favor applying the doctrine of collateral estoppel here, based upon the prior SEC action. As set forth in Comment, *The Effect Of SEC Injunctions in Subsequent Private Damage Actions—Rachal* v. *Hill,* 71 Col. L. Rev. 1329, 1336-1337 (1971):

> "The courts have consistently recognized the need for private actions to insure effective enforcement of the securities laws. They are a private policing weapon supplementing governmental action. The desirability of promoting the use of that weapon is undercored by the questionable efficacy of relying solely upon governmental enforcement measures.
>
> "It appears to follow from this important function of private suits and from the amount of government energy and expense utilized in securing SEC injunctions that a misdirection of efforts would result if the private plaintiff were not able to derive significant benefit from a successful SEC action.
>
> "The value of utilizing the original Commission action in subsequent private tests is underlined by the fact that, employed in isolation from other measures, the SEC injunction suit may often have only a limited effect. When the Commission brings a court action for injunctive relief, the after-the-fact nature of the decree brings into question its practical effect, particularly in the area of misrepresentation and collusion under rule 10b-5. As Judge Friendly pointed out in SEC v. Texas Gulf Sulphur Co., an injunction is not an effective remedy for dealing with a scheme like that in Rachal v. Hill, because the violation is normally a once-in-a-lifetime occurrence." Id. at 1336-1337. (Footnotes omitted).

In the instant situation, there was not even an injunction issued in the SEC action because, while the omissions from the Proxy Statement were found to be material and knowing, the court in the SEC action felt that an injunction was unwarranted. Rather, it looked to the instant action, *inter alia,* to redress the harm inflicted upon the class. *Securities and Exchange Commission* v. *Parklane Hosiery Co.,* 422 F. Supp. 477, 486 (S.D.N.Y. 1976), *aff'd,* 558 F.2d 1083 (2d Cir. 1977). It is, therefore, clear that there would be no unfairness in precluding re-litigation here of the facts determined in the SEC action.

The court-created doctrine of collateral estoppel, as extended by the courts to remove the requirement of mutuality, and in particular by this Court in *Blonder-Tongue, supra,* is a procedural refinement adopted after 1791. As with other procedural refinements and changes approved after the adoption of the Seventh Amendment, it may be used by a court to determine whether factual issues exist for jury determination. The test is whether the court may preclude jury determination in a manner just and equitable which would retain the jury's function as an efficient instrument in the administration of justice. It is respectfully submitted that preclusion of the issues determined in the SEC action, through application of the doctrine of collateral estoppel, which would still permit a jury to determine all other issues here in dispute, is consistent with both the Seventh Amendment and the present status of the doctrine of collateral estoppel.

III.

The Court below properly analyzed this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) whereas the Fifth Circuit did not in *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971).

The decision of the Court below is in conflict with that of the Fifth Circuit in *Rachal, supra,* decided before *Blonder-Tongue, supra. Blonder-Tongue* appears to overrule *Rachal* in its removal of the mutuality requirement. *Blonder-Tongue* decided that a litigant is not entitled to "more than one full and fair opportunity for *judicial* resolution of the same issue." 402 U.S. at 328. (Emphasis added). That decision does not state that a *jury* determination is required to preclude re-litigation.

If this Court does not agree that *Blonder-Tongue* overruled *Rachal,* it is clear that the decision below is correct. The decisions in both *Rachal* and the Court below are based upon an analysis of this Court's decision in *Beacon Theatres.* It is respectfully submitted that the decision below is consistent with that in *Beacon Theatres,* whereas that of the Fifth Circuit in *Rachal* is not.

In *Rachal,* the plaintiff, in a private action seeking money damages, sought by the application of the collateral estoppel doctrine, to estop the defendants to deny facts found against them in a prior SEC injunction action and, on that basis, to award plaintiff summary judgment. The Fifth Circuit did not permit the application of the doctrine holding that to apply it, in that case, would deny the defendants their right to a jury trial. In so holding, the Court in *Rachal* relied upon *Beacon Theatres, supra.*

In *Beacon Theatres* this Court held that, in a single action in which an equitable claim and a legal counterclaim were presented the legal counterclaim had to be tried prior to the equitable claim. In so holding this Court recognized that the failure to try the legal counterclaim first would result in the loss of the defendants' rights to a jury trial on that claim, stating:

> "Thus the effect of the action of the District Court could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit,' for determination of the issue of clearances by the judge might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim'." *Id.* at 504.

This Court in *Beacon Theatres* recognized that when in a single action neither an equitable nor a legal claim had yet been heard, the legal claim must be heard first in order to avoid precluding a jury trial on that legal claim. *Accord, Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962); *Meeker* v. *Ambassador Oil Co.,* 375 U.S. 160 (1963) (*per curiam*), *rev'g* 308 F. 2d 875 (10th Cir. 1962).

If the equitable claim were heard first, because of the doctrine of collateral estoppel, there would be no right to a jury trial on the issues determined by the court in its determination of the equitable claim. As stated in Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal* v. *Hill,* 85 Harv. L. Rev. 442, 446-447 (1971):

> "*Beacon Theatres* thus indicated that whenever principles of former adjudication or law of the case might preclude jury trial on an issue previously litigated before a judge in the same proceeding, the trial judge must, in the absence of exceptional circumstances, order the trial of issues within that proceeding to assure that foreclosure does not occur. But *Beacon Theatres* did not imply that principles of former adjudication should themselves be changed under the influence of the seventh amendment. *Rachal* takes exactly the opposite tack from *Beacon Theatres,* concluding that seventh amendment considerations do influence the application of these principles when reordering is impossible, as it was in *Rachal* because of the separateness of the two proceedings."

In *Beacon Theatres,* where there were legal and equitable claims in one suit and where the court could determine the order of trial of the claims, this Court ordered that the legal claims be heard first. It is only where it is within the

power of the court to avoid preclusion of a jury adjudication of issues common to both legal and equitable claims by scheduling the hearing of those issues by the jury first, that the court should do so.

The court in *Rachal* misinterpreted this learning from *Beacon Theatres* and in an internally inconsistent decision did not preclude re-litigation of the issues determined in the prior action. The *Rachal* court recognized that scheduling was not the issue, *i.e.,* that the legal claims could not be ordered tried to a jury before the equitable claims were tried by a court as those claims were already adjudicated in the prior action brought by the SEC. It also accepted the reasoning of *Beacon Theatres* that an equitable determination would preclude subsequent re-litigation to a jury of factual issues in a legal action, by stating that:

> ". . . if the equitable issues were tried first the doctrine of *res judicata* would most likely preclude further litigation of the same issues in the subsequent proceedings before a jury . . ." *Rachal,* 435 F.2d at 64.

Inexplicably, the *Rachal* court then stated that it relied upon *Beacon Theatres* in deciding against the plaintiff, and allowed re-litigation, even though it specifically understood *Beacon Theatres* to mean that there would be a preclusion of a subsequent determination as to facts which were determined by a court in a prior proceeding. Thus, *Rachal* reaches a conclusion opposite to the teachings of *Beacon Theatres* while ostensibly relying upon it as precedent. Accordingly, *Rachal* is incorrectly decided and subsequent cases which rely upon *Rachal's* analysis are similarly unsound.

An analysis of the comments on the *Rachal* decision, and the case law prior to and subsequent to that decision, all make it abundantly clear that the Fifth Circuit erred

in not applying the doctrine of collateral estoppel. Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal* v. *Hill*, 85 Harv. L. Rev. 442 (1971). *See, Goldman, Sachs & Co.* v. *Edelstein*, 494 F. 2d 76 (2d Cir. 1974); *Crane Co.* v. *American Standard Inc.*, 490 F. 2d 332 (2d Cir. 1973); *In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211 (N.D. Ill. 1977); *Whitman Elec. Inc.* v. *Local 363, Int. Bro. of Elec. W.*, 398 F. Supp. 1218 (S.D.N.Y. 1974); Note, *Goldman, Sachs & Co.* v. *Edelstein: The Application of Collateral Estoppel Principles in Derogation of the Right to Jury Trial*, 1974 Duke L.J. 970 (1974); Note, *Right to Jury Trial in Civil Actions —Crane Co.* v. *American Standard, Inc.*, 490 F. 2d 332 (2d Cir. 1973), 41 Bklyn. L. Rev. 911, 956-958 (1975); Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions—Rachal* v. *Hill*, 71 Col. L. Rev. 1329 (1971).

The decision in *Meeker* v. *Ambassador Oil Co.*, 375 U.S. 160 (1963) (*per curiam*), adds nothing to Petitioners' argument. *Meeker* simply restates the *Beacon Theatres* teaching that, if in one lawsuit, common issues are present which relate to both legal and equitable claims, the jury must hear the common issues first to avoid the preclusion of a jury trial because of collateral estoppel. In fact, *Meeker* undercuts Petitioners' contentions that a judgment in an equitable proceeding cannot estop re-litigation of the same facts in a subsequent legal action, because were it not for the foreclosure effect of the prior equitable judgment the Court would not have troubled reordering the sequence of the hearings. See, *Katchen* v. *Landy*, 382 U.S. 323, 336-340 (1966); *Crane Co.* v. *American Standard Inc.*, 490 F.2d 332, 342 (2d Cir. 1973). As this Court stated in *Katchen* v. *Landy*, 382 U.S. at 339-340:

> "For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled. . . . *Both Beacon Theatres and Dairy Queen recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim.*" (Emphasis added).

Furthermore, as this Court stated in *Ross* v. *Bernhard* 396 U.S. 531, 537-538 (1970), referring to the decisions in *Beacon Theatres* and *Dairy Queen*:

> "Under those cases, where equitable and legal claims are joined in the same action, there is right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."

The Second Circuit in *Crane Co.* v. *American Standard Inc.*, 490 F.2d 332, 342-343 (2d Cir. 1973), subsequently adopted the *Beacon Theatres* reasoning and applied facts, adduced in a prior non-jury proceeding, to a subsequent proceeding involving the same two parties, in which a possible jury trial right existed, stating:

> "The very basis of *Beacon Theatres* was that the effect of a trial of the equitable claim "could be, as the Court of Appeals believed, 'to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damages suit,' for determination of the issue of clearances by the judge might 'operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.'" 359 U.S. at 504, 79 S.Ct. at 953. *It was to avoid*

> *this preclusive effect that the Supreme Court directed initial trial of the legal counterclaim.* Here the merits of the fraud action had been tried by a judge in equity, without objection or basis for one, and reviewed on appeal. *This court's determination in its opinion on appeal stands beyond challenge in the fraud action and precludes relitigation by the parties of all issues resolved there."* (Emphasis added).

Accord, Goldman Sachs & Co. v. *Edelstein, supra; In re Transocean Tender Offer Securities Litigation supra; Whitman Elec. Inc.* v. *Local 363, Int. Bro. of Elec. W., supra.* Indeed, the Second Circuit recently reiterated the fact that an equitable determination could have preclusive effect on a subsequent legal claim, in *Securities and Exchange Commission* v. *Commonwealth Chemical Securities,* 574 F.2d 90, 97 (2d Cir. 1978), where it stated:

> "As we noted in *Crane* v. *American Standard, Inc.,* 490 F.2d 332, 342 (2d Cir. 1973), the holding in *Beacon Theatres* v. *Westover,* 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988 (1959), the *fons et origo* of modern concern over the interplay between the right to jury trial in suits at common law and the lack of such a right in suits in equity, assumed that there would be no jury trial on the plaintiff's claim for an injunction and a declaratory judgment and that a judgment for the plaintiff on these claims would work as a collateral estoppel on the defendant's counterclaim for damages."

The decisions of this Court in *Beacon Theatres* and its progeny make it clear that the doctrine of collateral estoppel precludes re-litigation of issues tried to a court even though, absent that prior litigation, the parties would have been entitled to a jury trial on those issues. Were it not for this preclusive effect, this Court in *Beacon Theatres*

would not have been concerned whether the legal or equitable claims were tried first. Accordingly, the decision below, and not that in *Rachal,* correctly applied this Court's decision in *Beacon Theatres.*

Combining the decision in *Beacon Theatres* with that in *Blonder-Tongue,* it is clear that the Court below decided the instant action correctly in precluding re-litigation of issues determined in the SEC action. By not requiring mutuality, since Petitioners had had a full and fair opportunity to litigate those facts in the SEC action, the Court below properly applied the decision in *Blonder Tongue.* By recognizing that the previously determined equitable claims in the SEC action could not be re-scheduled so as to be heard before the legal claims here, and therefore not requiring a jury trial on those claims, the Court below properly applied the decision in *Beacon Theatres.*

IV.

The observation by the Court below that the Petitioners had failed to protect their right to jury trial was mere dictum and not necessary for the decision below.

The Petitioners expend considerable effort arguing that the Court below held that they had failed to protect their jury trial rights, if any, in the instant action by failing to seek a jury or an advisory jury in the SEC action or to seek an expedited trial of the present action. The Court below did not so hold, but rather raised in dictum the question of waiver of the jury right. Whether the Petitioners waived any right to a jury trial was and is unnecessary to the decision. The Court below so indicated by prefacing its observations on Petitioners' waiver of their jury rights as follows:

> "Were there any doubt about the matter, it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs . . ." App. p. 14a.

Petitioners were fully apprised of the instant action at the time of the trial in the SEC action and failed to take any steps to preserve or protect any rights they might have had to a jury trial in the instant action. Accordingly, to the extent that they waived jury trial rights in the SEC action, such waiver constitutes a waiver of any rights herein to a trial by jury. The Petitioners suggest (Brief at 30) that the waiver concept should not be applied to them in view of their purported reliance upon *Rachal, supra.* Were there such reliance, it was misplaced since several decisions of the Second Circuit had criticized the holding in *Rachal* and questioned its soundness. This was recognized by the Court below which stated:

> "Our disagreement with the Fifth Circuit's decision in *Rachal* should come as no surprise to those familiar with some of our recent decisions bearing on the question present." (App. A, p. 18a).

The instant decision did not, as claimed by the Petitioners, question established authority for the first time. Rather, the holding below was simply another in a line of pronouncements on the matter by the Second Circuit. Accordingly, whatever reliance Petitioners placed on *Rachal* was unfounded and they cannot now use *Rachal* in an attempt simply to get a second trial of issues already fully and fairly aired.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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